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In The

Supreme Court of the United States

October Term, 1985

MICHAEL J. BOWERS,
ATTORNEY GENERAL OF GEORGIA,

Petitioner,

v.

MICHAEL HARDWICK, AND
JOHN AND MARY DOE,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF NATIONAL GAY RIGHTS ADVOCATES, BAY AREA LAWYERS FOR INDIVIDUAL FREEDOM, LOS ANGELES LAWYERS FOR HUMAN RIGHTS AND CALIFORNIA LAWYERS FOR INDIVIDUAL FREEDOM, AMICI CURIAE, IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether a State exceeds its inherent police power when it attempts to induce conformity to a particular moral view through the imposition of substantial criminal penalties upon intimate conduct between consenting adults which takes place in the seclusion of the home.

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National Gay Rights Advocates, Bay Area Lawyers for Individual Freedom, Los Angeles Lawyers for Human Rights and California Lawyers for Individual Freedom file this brief *amici curiae* with the consent of the parties.

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INTEREST OF THE AMICI CURIAE

National Gay Rights Advocates is a nonprofit, public interest law firm involved in litigation throughout the country to advance the civil rights of lesbians and gay men. This litigation has addressed major constitutional issues as well as procedural matters and issues of state law, including housing and employment discrimination, immigration and naturalization policies, challenges to laws which proscribe private sexual conduct of consenting adults and the rights of gay people to serve in the military.

Bay Area Lawyers For Individual Freedom (BALIF) is an organization of more than 400 gay and lesbian lawyers and legal workers that works to increase the input and representation of lesbians and gay men in the judiciary, local and state Bar organizations and other policy making bodies. BALIF also encourages and supports the appointment of lesbian and gay attorneys to the judiciary, public agencies and commissions; takes action on questions of law and the administration of justice as they affect the les-

bian and gay community, including the filing of *amicus curiae* briefs; endorses candidates for office; takes positions on ballot propositions; evaluates the qualifications of candidates seeking judicial appointment; analyzes and proposes legislation; gives testimony on bills dealing with gay issues; and presents educational programs.

Los Angeles Lawyers for Human Rights (LHR) is an affiliate of the Los Angeles County Bar Association. LHR was organized in 1976 to provide a focal point from which to address human rights issues, including those which have an impact on the gay and lesbian community. LHR is made up of judges, attorneys, and law students from diverse backgrounds. LHR participated as *amicus curiae* in *New York v. Uplinger*, 104 S.Ct. 2332 (1984) and *Board of Education v. National Gay Task Force*, 105 S.Ct. 1858 (1985). Like BALIF, as an organization of attorneys, LHR recognizes and is concerned about the overall discriminatory effect of laws which criminalize the private affectional behavior and intimate association of adults, especially in such areas as employment, housing, parenting, and delivery of governmental services.

California Lawyers for Individual Freedom (CALIF) is a statewide organization of over 650 lawyers concerned with securing equal civil rights for gay men and lesbians. CALIF promotes representation of gay men and women within State Bar committees and delegations, and takes action on issues of law as they affect the rights of lesbians and gay men, including the filing of *amicus curiae* briefs.

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STATUTORY PROVISION INVOLVED

The statute in question is Georgia Code section 16-6-2 (1981), which provides as follows:

> (a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another.
>
> * * * * *
>
> (b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years.
>
> * * * * *

A second portion of the statute, not at issue in this case, criminalizes forcible sodomy. The statute at issue applies to all persons, married or single, heterosexual or homosexual.

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SUMMARY OF ARGUMENT

The issue before the Court in this case is far more significant and complex than its phrasing by the State of Georgia would indicate. Properly phrased, the question is whether the State, using moral indignation as its justification, may intrude into personal relationships and invade people's homes to criminalize private consensual adult sexual conduct. *Amici* contend that where the sole objective of a statute is the regulation of private morality, the State's police power may not be employed to invade the privacy of protected spaces such as the home, absent

a strong showing of harm. The Georgia statute in question is an improper exercise of the police power because it imposes criminal sanctions in order to enforce conformity to a single moral view, and in the process invades important personal rights. The traditional disapproval of homosexuality, proffered by the State as a rationale for this statute, is an impermissible goal in a pluralistic, secular society and does not justify the extreme intrusions on protected interests which the Georgia statute permits. It is simply inconsistent with "the concept of ordered liberty" and with contemporary understanding of what constitutes a civilized society to permit the State to express disapproval by allowing the entry of police into the privacy of one's bedroom to make an arrest for harmless noncommercial sexual conduct between consenting adults.

ARGUMENT

I. THE STATE HAS FAILED TO SHOW SUFFICIENT JUSTIFICATION FOR THIS EXERCISE OF THE POLICE POWER WHICH INTRUDES INTO THE PRIVACY OF THE HOME TO REGULATE INTIMATE CONDUCT BETWEEN CONSENTING ADULTS.

The Georgia statute is an exercise of the State's police power, the power of the State to regulate in the public interest. The police power "connotes the time-tested conceptional limit of public encroachment upon private interests."[1] *Goldblatt v. Town of Hempstead*, 369 U.

[1] The "private interest" implicated when the State exercises its police power is the interest of the individual in liberty. The

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S. 590, 594 (1962). To determine if a regulation is a valid exercise of the police power, the Court is guided by the following rule:

> "To justify the State in . . . interposing its authority in behalf of the public, it must appear, first, that the interests of the public . . . require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals."

Id. at 594-95 (quoting *Lawton v. Steele*, 152 U.S. 133, 137 (1894)).

In evaluating whether a challenged exercise of the police power is "not unduly oppressive upon individuals," the Court's inquiry properly focuses on the nature of the individual interest which is burdened and the extent of the burden, the rationality of the connection between the legislative purpose and the means chosen to achieve that purpose, the legitimacy of the legislative purpose and the existence of alternative means to effectuate the legitimate governmental purpose. *Zablocki v. Redhail*, 434 U.S. 374, 396 (1978) (Stewart. J., concurring). *See also Moore v. City of East Cleveland*, 431 U.S. 374 (1978). The nature and magnitude of the individual interest involved largely determines the degree to which both the legislative purpose and the means chosen to promote it are subjected to

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Due Process Clause of the Fourteenth Amendment to the United States Constitution provides: " . . . nor shall any State deprive any person of life, liberty, or property, without due process of law." The Due Process Clause affords not only a procedural guarantee against the deprivation of liberty, but also protects substantive aspects of liberty against unconstitutional restrictions by the State. *Kelley v. Johnson*, 425 U.S. 238, 244 (1976).

judicial scrutiny. *See City of Cleburne v. Cleburne Living Center*, — U.S. —, 105 S.Ct. 3249, 3260-3261 (1985) (Stevens, J., concurring).

In the present case, two important individual interests are implicated: the interest in engaging in intimate conduct of one's own choosing and the interest in "residential privacy" or the maintenance of the home as "a sanctuary privileged against prying eyes . . . where most intimate associations are centered." Karst, *The Freedom of Intimate Association*, 89 Yale L.J. 624, 634 (1980). The individual's interest in engaging in truly private consensual sexual conduct, that is, sexual conduct in the seclusion of the home or a similar private space, is arguably "fundamental" within the meaning of this Court's prior decisions, as respondents and several other *amici* will argue. Even if not deemed "fundamental," however, these are undeniably important interests whose role in the life of individuals is significant, if not central. The Court has found that these interests are entitled to a significant degree of protection from governmental intrusion. *See, e.g., Roberts v. United States Jaycees*, — U.S. —, 104 S.Ct. 3244, 3249-3250 (1984); *Payton v. New York*, 445 U.S. 573, 589-590 (1980).

Previous decisions of this Court have derived from the "concept of personal liberty and restrictions upon state action" contained in the Fourteenth Amendment, a right of privacy which functions as a substantive limit on the police power of the State to control certain kinds of conduct. *Roe v. Wade*, 410 U.S. 113, 153 (1973). In *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973), this Court identified personal rights which may be deemed "fundamental" or "implicit in the concept of ordered liberty."

Id. at 65 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)). The Court noted that these include "*the personal intimacies of the home*, the family, marriage, motherhood, procreation, and child rearing." *Id.* (emphasis added).

The principle that the State must respect the home as a place of sanctuary is one of the most cherished in our system of law and one that is firmly grounded in the Constitution. As the Court stated in *Payton v. New York*, 445 U.S. 573 (1980),

> The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home—a zone that finds its roots in clear and specific constitutional terms: "The right of the people to be secure in their . . . houses . . . shall not be violated." That language unequivocally establishes the proposition that "[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."

Id. at 589-90 (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)).

The interest of the individual in the sanctuary of his home predominates even when the State seeks to regulate conduct not protected by a "fundamental" privacy right. Thus, the Court in *Stanley v. Georgia*, 394 U.S. 557 (1969), found that possession of obscene matter in the home was protected, even though such material was properly subject to regulation in the public arena. The Court stated:

> Moreover, in the context of this case—a prosecution for mere possession of printed or filmed matter in the privacy of a person's own home—that right takes on an added dimension. For also fundamental is the

> right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy.

Id. at 564.

Thus the home itself, both because of the individual's need for a place of sanctuary and because it is the locus of intimate associations, has long been considered deserving of special constitutional protection. *Stanley v. Georgia*, 394 U.S. 557 (1969); *see also*, Karst, *The Freedom of Intimate Association*, 89 Yale L.J. 624, 634 (1980); Wilkinson & White, *Constitutional Protection for Personal Lifestyles*, 62 Cornell L.Rev. 563, 588-89 (1977); Seigel, *Privacy: Control Over Stimulus Input, Stimulus Output and Self-Regarding Conduct*, 33 Buffalo L.Rev. 35 (1984); Comment, *A Taxonomy of Privacy: Repose, Sanctuary and Intimate Decision*, 64 Calif. L.Rev. 1447 (1976); Note, *Roe & Paris: Does Privacy Have a Principle?* 26 Stan.L.Rev. 1161, 1185-89 (1974).

The Court in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 59 (1973), found the State's interests in controlling the public, commercial exploitation of sexuality and in establishing a "moral tone" for downtown areas sufficient to justify prohibiting the viewing of obscene material in a theatre. When the materials are viewed in the confines of one's home, however, the individual's interests in maintaining the home as a sanctuary for self-expression and as a situs for intimate relationships increase substantially, while the State's interests are considerably, if not entirely, diminished. When the Court in *Paris Adult Theatre I* rejected the notion that consenting adults had a right to watch obscene films in a public theatre, it reiterated that although such conduct was not protected by a fundamental

privacy right it was nevertheless beyond the reach of the criminal law when it took place in the home. *Id.* at 66 (citing *Stanley v. Georgia*, 394 U.S. 557 (1969)).

The choice to form and maintain intimate human relationships is also a fundamental element of the personal liberty guaranteed by our constitutional system, and one which is protected from unwarranted interference by the State. *Roberts v. United States Jaycees*, — U.S. —, 104 S.Ct. 3244, 3249 (1984). The Court stated:

> [T]he constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty.

Id. at 3250.

The protection from unjustified government intrusion is not limited to marriage and "traditional" family relationships. As the Court in *Roberts* recognized, between the poles of family relationships and business associations,

> lies a broad range of human relationships that may make greater or lesser claims to constitutional protection from particular incursions by the State. Determining the limits of state authority over an individual's freedom to enter into a particular association therefore unavoidably entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments.

Id. at 3251.

An objective evaluation of homosexual relationships will locate them on the spectrum of human interactions

closer to intimate family relationships than to impersonal business associations. Accordingly, there must be a higher degree of justification for State interference with a homosexual relationship than with a business arrangement.

Consistent with this Court's recent opinions, *amici* contend that the State must make a stronger showing to justify legislation which has as its only purpose the control of morality, especially when that legislation reaches into the confines of the home and touches intimate relationships. The State has broader latitude to regulate conduct in public places or conduct which more directly impinges on public sensibilities.[2] *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973); *Eisenstadt v. Baird*, 405 U.S. 438, 447-449 (1972). However, the protection given to conduct in the home applies even where the prohibited conduct is not subject to the kind of per se privacy protection as are decisions regarding marriage and childbearing, and even where the majority disapproves of the conduct. *Stanley v. Georgia*, 394 U.S. 557 (1969).

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[2] For example, the State has a legitimate interest in regulating sexual conduct which takes place in public. As this Court has observed, the high degree of constitutional protection given to the marital relationship does not protect "marital intercourse on a street corner" or "at high noon in Times Square." *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 66 n.13, 67 (1973).

II. NEITHER THE DESIRE FOR MORAL CONFORMITY NOR THE TRADITIONAL DISAPPROVAL OF HOMOSEXUALITY ARE SUFFICIENT TO JUSTIFY THE GEORGIA STATUTE AS A PROPER EXERCISE OF THE POLICE POWER.

A. The Regulation Of Private Morality Does Not Justify Georgia's Intrusion Into Intimate Relationships And The Home.

Petitioner concedes that the aim of the Georgia statute is to promote traditional morality. Petitioner's Brief at 34-36. However, the promotion of traditional notions of morality does not justify imposing criminal sanctions upon private consensual adult sexual behavior.

The State, of course, may regulate sexual activity when such regulation promotes a legitimate state interest. For example, Georgia has a proper role in proscribing forcible sexual acts, in protecting minors from being sexually used by adults, in preventing public displays of sexual behavior, and in regulating the commercialization of sexual activity. To promote these valid state interests, Georgia has a broad range of criminal statutes proscribing rape, Georgia Code section 16-6-1 (1981); forcible sodomy, *id.*, section 16-6-2; statutory rape, *id.*, section 16-6-3; child molestation, *id.*, section 16-6-4; public indecency, *id.*, section 16-6-8; prostitution, *id.*, section 16-6-9; pimping, *id.*, section 16-6-11; and pandering, *id.*, section 16-6-12. Obviously, with these prohibitions in place, the Georgia statute in question has only one possible purpose—regulation of the private sexual behavior of adults.

The sexual acts proscribed by the statute at issue are subject to criminal penalties even when they take place in

total seclusion. The sole purpose for reaching such private conduct, and Petitioner's admitted rationale, is the expression of the collective moral disapproval of the enumerated acts by the General Assembly of Georgia. Petitioner's Brief at 31. This, however, is an impermissible purpose.

The protection of the public morality may, in some instances, be a legitimate State purpose. *Paris Adult Theatre I v. Slaton,* 413 U.S. 49, 69 (1973). However, private adult consensual sexual activity takes place without public scrutiny and without intruding upon the sensibilities of the general public. There is no element of force, commercialization, or exploitation of minors. In addition, nobody, including the participants, suffers any harm which justifies state intrusion.[3] In this instance, the interests of individuals in the sanctuary of their homes and in maintaining intimate relationships outweighs the interest of the State in regulating morality. Quite simply, " [n]o harm to the secular interests of the community is involved in atypical sex practice in private between consenting adult partners." Model Penal Code § 107.5—Sodomy and Related Offenses. Comment (Tent. Draft No. 4, 1955).

In the absence of any intrusion on the sensibilities of the general public, or any component of force, coercion,

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[3] For example, statutes which regulate private conduct by prohibiting drug use or requiring motorcyclists to wear protective helmets, have been upheld, in part, on the ground that the State has an interest in preventing its citizens from harming themselves. *See, e.g. State v. Baker,* 56 Hawaii 271, 535 P.2d 1394 (1975) (use of marijuana); *State v. Lombardi,* 104 R.I. 28, 241 A.2d 625 (1968) (helmets). However, in the case of sodomy, even this element of self-inflicted harm is absent.

exploitation of the young or commercialization, the sole statutory purposes to be served are the prevention of moral indignation, outrage or disgust with which one segment of society regards another, and the enforced conformity of private sexual conduct to state-prescribed norms. Whatever the validity in other societies of the use of the criminal law to enforce majority views regarding private morals,[4] such use is singularly inappropriate in a secular, pluralistic society such as ours which was founded upon a tradition of nonconformity and which has institutionalized a number of guarantees in the Bill of Rights and Civil War Amendments to protect minorities from the democratically expressed will of the majority.

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.

West Virginia Board of Education v. Barnette, 319 U.S. 624, 638 (1943).

The notion of required conformity to official views on matters so personal is antithetical to the basic political traditions of our society. *Id.* at 639-642. This deeply rooted respect and protection for minority rights in personal matters has proved sufficient to overcome the dis-

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[4] *See*, e.g., the debate between H.L.A. Hart and Lord Patrick Devlin on the criminalization of private sexual conduct. H.L.A. Hart, *Law, Liberty and Morality* (1963); P. Devlin, *The Enforcement of Morals* (1965); Levi, *The Collective Morality of a Maturing Society*, 30 Wash. & Lee L.Rev. 399 (1973); Note, *Roe and Paris: Does Privacy Have a Principle?* 26 Stan. L.Rev. 1161, 1167-1171 (1974).

approval of a substantial part of the citizenry towards interracial marriage, contraception and abortion. *Loving v. Virginia,* 388 U.S. 1 (1967); *Griswold v. Connecticut,* 381 U.S. 479 (1965); *Eisenstadt v. Baird,* 405 U.S. 438 (1972); *Roe v. Wade,* 410 U.S. 113 (1973).

Anti-sodomy laws, as Petitioner points out, are rooted in religious teachings. Petitioner's Brief at 20-21. However, the quest for moral conformity or the extirpation of sin are inconsistent with the function of a government of limited powers in a secular society. *See* Henkin, *Morals and the Constitution: The Sin of Obscenity,* 63 Colum. L. Rev. 391 (1963). Even assuming the Georgia statute represents the majority's moral views, there are more appropriate methods for inculcating moral values than the criminal law:[5]

> Immorality clearly should not be viewed as a sufficient or even a principal reason for proscribing conduct as criminal. Morals belong to the home, the school, and the church; and we have many homes, many schools, many churches. Our moral universe is polycentric. The state, especially when the most coercive of sanctions is at issue, should not seek to impose a spurious unity upon it.

H. Packer, *The Limits of the Criminal Sanction* 267 (1968). *See also, People v. Onofre,* 51 N.Y.2d 476, 488 n.3, 415 N.E.

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[5] Petitioner argues that by decriminalizing sodomy, the State will be seen as condoning homosexuality and therefore immorality. Petitioner's Brief at 37-38. Yet removing criminal penalties from conduct does not automatically remove long-standing social or moral restrictions. Given the considerable social stigma attached to homosexual conduct, it is unlikely that removal of criminal penalties on private, consensual homosexual conduct will make homosexuality more attractive, or marriage less attractive. *See* H. Packer, *The Limits of the Criminal Sanction* 264-265 (1968).

2d 936, 940 n.3, 434 N.Y.S.2d 947, 951 n.3 (1980), *cert. denied* 451 U.S. 987 (1981); *Commonwealth v. Bonadio*, 490 Pa. 91, 96, 415 A.2d 47, 50 (1980).

In short, the State exceeds the proper bounds of the police power when it acts solely to impose traditional notions of propriety. "There must remain a realm of private morality and immorality which is, in brief, and crude terms, not the law's business." *Wolfenden Report—Report of the Committee on Homosexual Offenses and Prostitution* ¶ 61 (1963). This is particularly true where the only harm of the actions proscribed is repugnance to some members of society. *See* Comment, *Private Consensual Adult Behavior: The Requirement of Harm to Others in the Enforcement of Morality*, 14 U.C.L.A. L. Rev. 581 (1967); Karst, *The Freedom of Intimate Association*, 89 Yale L.J. 624 (1980).

When the State imposes criminal sanctions solely to prohibit that which it finds repugnant, it is regulating matters of personal taste. Such matters are beyond State regulation and properly left to the discretion of the individual. For example, in *Cohen v. California*, 403 U.S. 15 (1971), Justice Harlan wrote that the right to speech cannot be curtailed merely because the State, acting as guardian of the public morality, finds a vulgarity to be offensive.

> For, while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.

Id. at 25.

Similarly, in an area so personal as private consensual adult sexual conduct the government exceeds its authority when it chooses only certain sexual acts as "proper" for its citizens.

As was asserted at the outset, the issue is not whether there is necessarily a "fundamental" right to engage in homosexual conduct, or indeed in any adult sexual conduct. Rather, the issue is whether the police power of the State may be employed to intrude into intimate relationships and enforce the Legislature's views as to what is proper sexual conduct when that conduct takes place in a secluded, private space such as the home. The desire for moral conformity is not a sufficient justification for the extreme intrusions which result from enforcement of the Georgia statute.

B. The Traditional Disapproval of Homosexuality Is Not A Sufficient State Interest To Justify This Exercise Of The State's Police Power.

In addition to its interest in promoting traditional notions of morality, the State of Georgia justifies its statute on the basis of the historical antipathy towards homosexuals. Petitioner's Brief at 20-23. However, the bare desire to harm an unpopular group is not a legitimate state interest. *United States Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973). In *Moreno*, the Court considered legislation which was amended to prevent hippies and hippie communes from participating in the food stamp program. The Court stated:

> "[A] purpose to discriminate against hippies cannot, in and of itself and without reference to [some independent] considerations in the public interest, justify the 1971 amendment."

Id. at 534-35 (quoting the opinion of the District Court below, 345 F.Supp. 310, 314 n.11 (D.D.C. 1973)).

Similarly, the Court in *O'Connor v. Donaldson*, 422 U.S. 563 (1975), struck down a statute providing for incarceration of mentally ill persons, stating:

> May the State fence in the harmless mentally ill solely to save its citizens from exposure to those whose ways are different? One might as well ask if the State, to avoid public unease, could incarcerate all who are physically unattractive or socially eccentric. Mere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty.

Id. at 575 (citations omitted).

If public animosity alone is an insufficient State interest to justify deprivation of government benefits or incarceration of the mentally ill, it follows that there must be a stronger rationale than distaste for homosexuals to justify a statute which provides for a prison term up to 20 years for private consensual adult sexual conduct.

In the context of racial prejudice, the Court in *Palmore v. Sidoti*, — U.S. —, 104 S.Ct. 1879, 1882 (1984) stated: "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." And, in *City of Cleburne v. Cleburne Living Center*, — U.S. —, 105 S.Ct. 3249 (1985), the Court struck down the application of a municipal zoning ordinance because it "appears to us to rest on an irrational prejudice against the mentally retarded." *Id.* at 3260. This same principle applies to the Georgia statute. The State has no legitimate interest in a statute which, solely on the basis of public distaste or disapproval and without a

showing of harm to a public interest, outlaws private consensual sexual conduct.

Finally, in relying on the traditional condemnation of homosexuality to defend its statute, Georgia ignores the fact that the statute at issue criminalizes the same sexual acts performed by heterosexuals, both married and single. Even if the bald desire to proscribe homosexual conduct were a legitimate state interest, that interest is not rationally advanced by this statute because it criminalizes both heterosexual and homosexual acts. Furthermore, with respect to acts of sodomy committed by married persons, enforcement of this statute violates the "privacy surrounding the marriage relationship" and invades "the sacred precincts of marital bedrooms." *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965).

III. THE CRIMINAL SANCTION IS AN IMPERMISSIBLE MEANS BY WHICH TO ACCOMPLISH THE STATE'S PURPOSE OF IMPOSING MORAL CONFORMITY ON ITS CITIZENS.

In addition to focusing on the nature of the individual interests at stake and the legitimacy of the State's purpose, the Court must examine the degree to which the State utilizes permissible means to promote a legitimate goal. *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 647 (1974). In this instance, even if the prevention of homosexual conduct were a legitimate state purpose, the use of criminal sanctions is an impermissible means of effectuating that purpose. Enforcement of the statute is not only a gross intrusion upon important liberty interests, but it is an ineffective way of promoting the State's view of morality.

The Georgia statute is virtually unenforceable when applied to consensual adult intimate behavior which takes place in the privacy of the home. By definition, such conduct occurs in a place where it will only rarely be discovered by the State. It involves no victim to report the "crime," and causes no harm which might bring the conduct to the attention of the authorities. In reality, the proscribed conduct can be detected only by objectionable police surveillance techniques. As a consequence, enforcement is at best erratic, and at worst arbitrary and discriminatory. *See* H. Packer, *The Limits of The Criminal Sanction* 304 (1968).

To promote its moral values, the State has available to it a wide variety of means less intrusive upon personal liberty. These include "theological teaching, moral suasion, parental advice, psychological and psychiatric counseling and other non-coercive means." *People v. Onofre,* 51 N.Y.2d 476, 488 n.3, 415 N.E.2d 936, 940 n.3, 434 N.Y.S.2d 947, 951 n.3 (1980) *cert. denied,* 451 U.S. 987 (1981). In view of the liberty interests at stake, and the unenforceability of the statute, *amici* submit that the use of the criminal sanction in an impermissible means to further the State's interest in moral conformity.

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CONCLUSION

The Georgia statute infringes on the right of Michael Hardwick to determine with whom and how he will experience sexual intimacy. In effect, Georgia has said that even in the home there is no sanctuary for persons who are homosexual. Such persons may never engage in sex-

ual relations, no matter that they take place in a totally private setting, no matter the quality or duration of the relationship involved.

Amici submit that where adult sexual conduct is purely consensual, does not impinge on other members of the public, and does not harm the persons involved, the State's interest in the promotion of traditional morality does not justify imposition of criminal sanctions. As this case demonstrates, the enforcement of such laws requires an impermissible level of government intrusion into the home, as well as into matters so basic and personal as the choice of persons with whom one will be intimate. Georgia has failed to demonstrate a reason why criminalizing such private choices predominates over the individual's interest in maintaining intimate associations in the sanctuary of the home.

For the foregoing reasons, the Georgia statute should be held to be an unconstitutional exercise of the State's police power.

Respectfully submitted,

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